No. 83-1468

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD DURANT, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly held that an attorney was not entitled by the attorney-client privilege to refuse to disclose to the grand jury the identity of his client who paid him with a check that had been drawn on a bank account into which stolen checks had been deposited.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 723 F.2d 447.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1983. The petition for a writ of certiorari was filed on March 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 1, 1983, Special FBI Agent Edwards visited the office of petitioner, an attorney, and ex-

plained that the FBI was investigating the theft of numerous checks made payable to International Business Machines, Inc. ("IBM"). Edwards stated that a number of the stolen checks had been traced and shown to have been deposited into various bank accounts under names of non-existent organizations, at least one of which included the initials "IBM." Edwards produced a photostatic copy of a check that had been drawn on one of these fictitious accounts and had been made payable to petitioner's law firm. Petitioner conceded that this check for $15,000 had been received by his law firm for services rendered to a client in two cases, one of which was "finished" and the other of which was "open," and had been endorsed by the firm. However, petitioner refused to disclose the identity of the client to whose credit the proceeds had been applied, asserting the attorney-client privilege. Pet. App. 1a-2a.

On the following day, petitioner was subpoenaed to appear before a grand jury in the United States District Court for the Eastern District of Michigan. During that appearance, he again refused to identify the client on whose behalf payment was made by the check in question. The government immediately moved for an order requiring petitioner to provide the requested information. At a hearing that same afternoon, petitioner informed the court that his invocation of the privilege was justified because disclosure of the client's name would implicate the client in criminal activity. In addition, petitioner stated that he did "not know any of the facts about this theft or anything else" (Pet. App. 2a). The court held that the privilege was not applicable and ordered petitioner to identify the client. Upon his refusal to do so, petitioner was held in contempt. *Ibid.*

On March 9, 1983, a subpoena was issued directing petitioner to appear before the grand jury and produce a list of all the clients of his law firm. Petitioner moved to quash the subpoena based on the attorney-client privilege, once again asserting that production of the documents would implicate his client in criminal activity. Petitioner claimed that disclosure of his client's name would implicate the client in the very criminal activity about which the client had sought legal advice. Petitioner did not, however, seek to introduce evidence establishing that his client had indeed sought legal advice relating to the theft of the IBM checks (Pet. App. 3a-5a).

In response to petitioner's new assertion that his client had engaged petitioner's services specifically to defend against possible charges of theft in connection with the IBM checks, the government introduced the client's check into evidence. A notation on the lower left corner of the check stated "corporate legal services." The government also pointed out that the FBI had not initiated the investigation in this matter —or even been informed of the theft of the IBM checks—until approximately two weeks after the check had been received by petitioner. The district court withheld a decision on petitioner's motion to quash the subpoena pending appellate resolution of the contempt order arising out of petitioner's refusal to name the particular client whose identity the grand jury sought. Pet. App. 5a.

2. The court of appeals affirmed the judgment of contempt against petitioner (Pet. App. 1a-15a). The court of appeals stressed that the purpose of the attorney-client privilege is to protect confidential communications by the client to his lawyer on matters relating to the lawyer's representation of the client

and that the courts of appeals are "unanimously in accord with the general rule that the identity of a client is, with limited exceptions, not within the protective ambit of the attorney-client privilege" (Pet. App. 8a). The court then rejected petitioner's contention that the identity of the client who paid for services by means of the check in question nevertheless was privileged under two asserted "exceptions" to this general rule.

First, the court rejected petitioner's reliance upon an exception permitting assertion of the privilege upon the showing of a "strong possibility" that disclosure of the client's identity would implicate him in the very offenses in connection with which he sought legal advice (Pet. App. 9a-10a, 14a, 15a). Although the court agreed that disclosure would not be required in those circumstances (Pet. App. 10a), it found that petitioner had "clearly failed to satisfy his burden of demonstrating a 'strong possibility' that disclosure of the identity of his client would implicate that client in the very [matter] for which legal advice had been initially sought" (*id.* at 15a). The court noted in this regard that petitioner had failed to make an ex parte, in camera submission to substantiate his claim, but instead had rested on his "blanket assertion" that the client had initially sought legal advice on matters relating to the theft of the IBM checks (*id.* at 14a-15a). "Such unsupported assertions of privilege," the court explained, "are strongly disfavored" (*id.* at 15a). The court also noted that at the first hearing, on March 2, 1983, petitioner "had expressly disavowed knowledge of the existence of stolen IBM checks," which, the court explained, "significantly diminishes the credibility of [petitioner's] subsequent March 22 representation that his client had indeed

engaged [petitioner's] services for past activity relating to stolen [IBM] checks" (*ibid.*).

Second, the court of appeals rejected petitioner's argument for another exception permitting assertion of a privilege not to disclose the client's identity "when disclosure of the identity of the client * * * provide[s] the 'last link' of evidence [leading to the client's indictment]" (*id.* at 12a). The court reasoned that such an exception "is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege" (*id.* at 13a (emphasis in original); see also *id.* at 14a).

ARGUMENT

The decision of the court of appeals rejecting the claim of privilege in the circumstances of this case is plainly correct. A lawyer has no less an obligation than a doctor, accountant, or any other member of the community to identify to the grand jury the person who paid for his services by a check drawn on an account containing stolen funds. Petitioner's efforts to conceal this information behind the cloak of the attorney-client privilege perverts the salutary purposes of that privilege, and the court of appeals' rejection of those efforts does not conflict with any decision of this Court or of any court of appeals. Review by this Court therefore is not warranted.

1. Under the attorney-client privilege, "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests

in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). In short, the privilege protects confidential communications by the client to his lawyer.

In this case, however, petitioner was not asked to divulge the substance of confidential communications by the client who paid him by the check drawn on stolen funds. He was asked to divulge only his client's identity. And as petitioner concedes (Pet. 9), the "[f]ederal courts are unanimously of the opinion that the identity of a client is, with limited exceptions, not protected by the attorney-client privilege." The basis of this consensus is found in the nature of the privilege itself, which protects only confidential *communications*. As this Court recognized more than 150 years ago, the mere identification of a person as the client of a lawyer "is preliminary, in its own nature, and establishes only the existence of the relation of client and counsel, and, therefore, might not necessarily involve the disclosure of any communications arising from that relation after it was created." *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 294-295 (1826). See also *In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983). Only where identification of the client in turn *would* "necessarily involve the disclosure of any communications" made by the client is the lawyer privileged from making that identification.

The court of appeals in this case recognized that the privilege would apply in such circumstances, under what it termed the " 'tantamount to a communication' exception" to the general rule that a client's

identity is not privileged—an exception the court described as applicable " 'where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.' " Pet. App. 11a (quoting *NLRB* v. *Harvey*, 349 F.2d 900, 905 (4th Cir. 1965)).[1] Although the court of appeals characterized the application of the privilege in such a case as an "exception" to a general rule that the client's identity is not privileged, in fact the propriety of the attorney's refusal to supply the information in such a case simply reflects the fundamental principle of the attorney-client privilege itself that information may be withheld where disclosure would reveal confidential communications. See *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 491-495 (7th Cir. 1984); *In re Osterhoudt*, 722 F.2d at 593-594. The identity of the client does not become privileged in its own right in such a case; the identity may be withheld only because it would in turn actually reveal a confidence.

In this case, however, petitioner did not contend in district court (see Pet. App. 15a) and does not contend here that the privilege applies because disclosure of the identity of his client would necessarily result in disclosure of that client's confidences. Petitioner instead relies on what he contends should be two

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[1] Thus, for example, if the grand jury had learned that an unidentified client of a particular lawyer had confessed to the lawyer that he had robbed a bank, the attorney-client privilege would protect the attorney from being required to reveal the identity of that client. Although the question would take the form of a request only for the identity of the client, if the attorney answered, the effect would be to disclose that a particular client made a particular confidential communication. The purposes of the attorney-client privilege would support its application in such a case.

other exceptions to the general rule that the identity of a client is not privileged. These contentions are without merit.

2. a. Petitioner first contends (Pet. 9, 15) that the identity of the client need not be disclosed when the person invoking the privilege is able to show a "strong possibility" that such disclosure would implicate the client in the very matter for which legal advice was sought in the first place. The court of appeals in this case in fact *agreed* with petitioner that it would be appropriate to recognize a distinct exception applicable in those circumstances (Pet. App. 14a-15a). We oppose the recognition of any such exception, because it (like the second exception upon which petitioner relies, discussed below) is not tied to the purpose of the attorney-client privilege of protecting confidential communications by the client. It is irrelevant for present purposes, however, whether such an exception would be proper; as the court of appeals held, the exception is inapplicable here in any event because petitioner did not show that the check was given to his firm as payment for legal advice pertaining to the client's possible criminal liability for the theft of the IBM checks. Petitioner therefore did not make the requisite showing that a "strong possibility" existed that disclosure of the information would implicate the client in the very matter for which legal advice had been sought in the first place (Pet. App. 14a).[2] The court of appeals'

[2] On the other hand, if the check drawn on stolen funds were paid to the law firm for services rendered in connection with the theft of the IBM checks, the circumstances would suggest an abuse of the attorney-client relationship by the client akin to that for which the "crime or fraud" exception to the attorney-client privilege applies. See *Clark* v. *United States*, 289 U.S. 1, 15 (1933).

resolution of this fact-bound issue against application of the first of the exceptions upon which petitioner relies was correct and does not warrant further review.[3]

b. Petitioner also contends (Pet. 10-13) that he was privileged from disclosing the identity of his client under a second exception, which he says should be applicable where such disclosure would supply the "last link" in a chain of incriminating evidence likely to lead to the client's indictment, even though no confidential communications would be revealed. The only difference between this asserted exception and the one just discussed is that, under petitioner's formulation, the criminal activity for which the disclosure of the client's identity would furnish the "last link" of in-

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[3] In finding that petitioner had not laid a proper foundation for assertion of this exception, the court of appeals noted that he had made only a "blanket assertion" that the client had sought advice in connection with the IBM checks, unsupported by any factual showing—by means of an in camera submission or otherwise—that this was the case (Pet. App. 15a). Such bare assertions of the privilege are strongly disfavored. See *United States* v. *Davis*, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982). The court further found the credibility of petitioner's bare assertion to be significantly undermined by his explicit disavowal of any knowledge of the IBM checks at the first hearing in this matter (Pet. App. 15a). We note as well that the check itself bore the notation "corporate legal services"—which does not suggest that the legal services in question concerned the client's personal criminal liability for the theft of the checks—and that the government informed the court that the FBI had not been notified of the theft of the IBM checks until approximately two weeks *after* petitioner had received the check (Pet. App. 5a), thereby making it all the more unlikely that the client initially sought his advice in connection with his possible liability for theft of the IBM checks.

criminating evidence apparently need not even have been related to the matters on which the client sought the lawyer's legal advice. Indeed, that necessarily is the basis of petitioner's argument here, in light of the court of appeals' holding that petitioner had failed to show that the client had sought his advice in connection with the theft of the IBM checks. Nothing in the nature or purposes of the attorney-client privilege supports a lawyer's refusal to identify the person implicated in the commission of a crime that is unrelated to the matters on which that person sought his legal advice. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 307-309 (1966).

As the court of appeals explained, moreover, the fundamental defect in this asserted exception is that it "is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege." Pet. App. 13a (emphasis in original). Instead, it appears to rest on notions derived from the Fifth Amendment privilege against compelled self-incrimination (*ibid*). This Court's decision in *Fisher* makes clear, however, that the Fifth Amendment affords petitioner no privilege to withhold the identity of his client simply because that information may prove to be incriminating, since there would be no compelled disclosure by the *client* involved. 425 U.S. at 396-401. Application of the attorney-client privilege, in contrast to the Fifth Amendment privilege, depends not on whether the lawyer is asked to furnish information that may incriminate his client, but rather on whether the lawyer is asked to reveal a confidential communication by his client (whether or not it is incriminating). Here, as is not disputed, no such communication would be revealed.

Petitioner therefore urges a significant extension of the privilege, based on a radical departure from the purposes it was intended to serve. This attempt is contrary to the Court's admonition that the privilege is not to be given an expansive scope: "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Fisher* v. *United States*, 425 U.S. at 403; accord, *Weatherford* v. *Bursey*, 429 U.S. 545, 555 n.4 (1977). See also *United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974). Other courts of appeals, like the court below in the instant case, also have rejected the contention that the attorney-client privilege permits a lawyer to refuse to divulge the identity of a client simply because that information might incriminate the client, focusing instead, as *Fisher* requires, on whether confidential communications would be disclosed. *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 491-495; *In re Osterhoudt*, *supra*, 722 F.2d at 593-594; *In re Grand Jury Empanelled Feb. 14, 1978 (Markowitz)*, 603 F.2d 469, 473 & n.4 (3d Cir. 1979); *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

In addition, important policy considerations weigh against extension of the attorney-client privilege beyond the protection of confidential communications to permit the concealment of the mere identity of the client as well—especially in light of the compelling public interest in uncovering evidence about the commission of a crime. See *United States* v. *Nixon*, 418 U.S. at 709-710. For example, when a matter is in

litigation, there is a widely shared view that a party is entitled to know the identity of his opponent and to know the authority of counsel representing an opposing interest. See 8 Wigmore, *Evidence* § 2313 (McNaughton rev. ed. 1961); McCormick, *Evidence* § 90, at 186 (1972). The public, too, has such a right. And as McCormick explains (§ 90, at 186-187), there is no reason why this principle should be limited to litigation, especially when the attorney's actions—here, the receipt and endorsement of a check drawn on an account containing stolen funds—may affect the rights of third parties. The practice of law is a public profession, regulated by licensing authorities, the bar, and the courts to assure the highest standards of professional integrity and public confidence in that integrity. The established rule that the identity of a person who a lawyer represents in a matter is not cloaked in secrecy furthers these interests, and there is no indication that this rule has significantly deterred individuals from consulting or confiding in a lawyer.

In contrast, to permit a lawyer to withhold such information even from a grand jury investigating the commission of a crime simply because that information might incriminate the client, as petitioner urges, could have a deleterious effect on the confidence of the public in the legal profession because it would transform the attorney-client privilege into an unwarranted shield protecting wrongdoers from the consequences of their acts. Indeed, as McCormick has observed (§ 90, at 187), "[o]ne who reviews the cases in this area will be struck with the prevailing flavor of chicanery and sharp practice pervading most of the attempts to suppress the proof of professional employment, and the broader solution of a general rule

of disclosure seems the one most consonant with the preservation of the high repute of the lawyer's calling." Accord, 2 Weinstein, *Weinstein's Evidence* ¶ 503(a)(4) [02], at 503-35 to 503-36 (1982). These concerns are not unwarranted even in this case. We need not question the sincerity of petitioner's invocation of the attorney-client privilege here to note the potential for public cynicism about the legal profession and the administration of justice that could result from a rule that would permit a lawyer —unlike a doctor, accountant, or anyone else in the community—to refuse to tell the grand jury who paid him by a check drawn on an account into which stolen checks had been deposited.

3. Petitioner contends (Pet. 10-13), however, that other courts of appeals have recognized an exception permitting a lawyer to withhold the identity of the client if disclosure would supply the "last link" of evidence incriminating the client, even if confidential communications would not be revealed, and he urges the Court to grant certiorari to resolve that conflict. Contrary to petitioner's contention, however, there is no such conflict warranting this Court's attention. Although some confusion has been engendered by ambiguous dicta in several opinions, recent appellate decisions indicate that the situation will be clarified by the lower courts.

a. As petitioner concedes (Pet. 9), the "last link" exception he urges has been traced to the Ninth Circuit's decision in *Baird* v. *Koerner*, 279 F.2d 623 (1960), in which the court held that the attorney-client privilege permitted a lawyer to decline to disclose the identity of the clients on whose behalf he made anonymous payments to the Treasury of sums due for the clients' back taxes. The Ninth Circuit's

upholding of the invocation of the attorney-client privilege in *Baird* v. *Koerner* itself has been rightly criticized.[4] But even if *Baird* v. *Koerner* were correctly decided, it does not support petitioner's position here. Although the Ninth Circuit in *Baird* pointed out that disclosure of the client's identity might be the "link" that could form the chain of evidence necessary to convict the client, the court appears to have rested its holding on the fact that disclosure of the client's identity would have revealed confidential communications—in the form of an acknowledgment

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[4] See McCormick, § 90, at 187 n.68 ("it may well be questioned whether the attorney was not in fact merely purveying anonymity, scarcely a professional legal service"); *Weinstein's Evidence* ¶ 503(a)(4)[2], at 503-34 to 503-35 ("It is questionable whether the attorney-client privilege which rests on the assumption that free consultation enhances the administration of justice should be enforced when non-disclosure interferes so strongly with the administration of justice. Here the attorney-client privilege is being used to gain a positive advantage for wrong-doers."). See also U.S. Br. in Opp. 13-14, *John Doe* v. *United States*, petition for cert. pending, No. 83-1309.

These criticisms seem to us rightly to reveal the fallacy of treating the result in *Baird* as an apt invocation of the attorney-client privilege. It is possible, of course, that the result in *Baird* nevertheless could be explained or defended on other grounds. The Ninth Circuit's holding may at bottom reflect the judgment that a somewhat different privilege from the one invoked—which could be called the privilege of anonymous restitution—is in the public interest. Such a privilege could reasonably be rooted in the conclusion that anonymous restitution is better than no restitution, which is what might have resulted in the future if *Baird* had reached an opposite outcome. Needless to say, this case involves no comparable independent public good to be served by maintaining the client's anonymity.

by the client that he was guilty of a criminal offense (or at least that he owed taxes) and, as a consequence, the client's motive for seeking legal advice (a matter which itself was regarded as privileged). See 279 F.2d at 629-631, 632, 633. In fact the Ninth Circuit recently made clear that this indeed was the basis of its decision in *Baird*, explaining that "[t]he principle of *Baird* was not that the privilege applied because the identity of the client was incriminating, but because in the circumstances of the case disclosure of the identity of the client was in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney." *In re Osterhoudt*, 722 F.2d at 593.[5] Accordingly, there is no merit to petitioner's claim (Pet. 9-10) that the Sixth Circuit's decision in this case rejecting the "last link" exception because it is not grounded in protection of confidential communications conflicts with the Ninth Circuit rule in *Baird*.[6]

b. Petitioner also asserts a conflict with decisions of the Fifth Circuit. See Pet. 7, 10. The first of the Fifth Circuit cases upon which he apparently relies (see Pet. 10) is *In re Grand Jury Proceedings*

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[5] See also 8 Wigmore, *supra*, § 2313, at p. 610 n.1 (the privilege was upheld in *Baird* "because disclosure of identity would lead ultimately to disclosure of taxpayer's motive for seeking legal advice").

[6] Similarly, the Seventh Circuit, which followed *Baird* on essentially identical facts in *Tillotson* v. *Boughner*, 350 F.2d 663, 665-666 (7th Cir. 1965), also recently clarified that the result in *Tillotson* and other cases, including *Baird*, was dependent upon the fact that disclosure of the client's identity would have disclosed confidential communications. *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 492-494.

(*Jones*), 517 F.2d 666 (1975). There, the court held that attorneys could not be required to identify the unnamed third parties who were also the attorneys' clients and who paid legal fees or posted bond for certain named clients. Although the court's reasoning is somewhat unclear and the opinion does mention that the disclosures might incriminate the unnamed third-party clients in tax matters, a close reading of the opinion indicates that it (like *Baird* v. *Koerner*, upon which it relied (517 F.2d at 672)) rested at least in part on the conclusion that disclosure of the identities of the unnamed third-party clients would have revealed confidential communications they made to the attorneys. See *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 493.[7] But to the extent that the decision in *Jones* may have been based on the mere fact that disclosure might incriminate the client, rather than protection of confidential communications, it is significant that *Jones* preceded this Court's decision in *Fisher*, which rejects the incriminatory nature of

[7] See 517 F.2d at 669 (explaining that the attorneys claimed the privilege because their answers "would disclose communications made to them in confidence"); *id.* at 672-673 (the attorneys were called "for the purpose of incriminating their undisclosed clients as to privileged communications"); *id.* at 674 ("Just as the client's verbal communications are protected, it follows that other information, not normally privileged, should also be protected when so much of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions"); *id.* at 674-675 ("The attorney-client privilege protects the motive itself from compelled disclosure, and the exception to the general rule protects the client's identities when such protection is necessary in order to preserve the privileged motive.").

the information as a basis for the lawyer to resist disclosure. 425 U.S. at 396-401.[8]

Petitioner also apparently relies (Pet. 7, 10) on the Fifth Circuit's subsequent decision in *In re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026 (1982) (en banc). However, in *Pavlick* the court held that the attorney was *not* privileged to withhold the identity of his client who furnished funds to pay the attorney and post bond for three other of the attorney's clients who were arrested in a narcotics smuggling scheme. Judge Gee's opinion, which does not appear to speak for a majority of the en banc court (see note 9, *infra*), acknowledged the Fifth Circuit's prior holding in *Jones* but distinguished it, principally on the ground that the "crime or fraud" exception to the attorney-client privilege applied because the third party's agreement to provide legal services in the event the three other clients were apprehended was in furtherance of the original conspiracy. 680 F.2d at 1028-1029. Judge Gee also

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[8] The result in *Jones* seems quite unwarranted in any event. The fortuity that the attorney for the targets also was the attorney for the third parties who paid the fees and posted bond for the targets (and therefore was in a position to receive confidential communications from the third parties regarding their own legal matters) should not be an occasion for extending a shroud of secrecy over the third parties' payment of the fees and bonds for the targets—information that otherwise would clearly not be privileged. If the third parties had paid these sums directly to the targets, there could be no claim of privilege, even if the fact that they did so would be incriminating. The mere fact that the sums instead were paid to the attorney to be expended on the targets' behalf should not trigger application of the privilege. Cf. *Wood* v. *Georgia*, 450 U.S. 261 (1981). See *In re Grand Jury Proceedings* (*Freeman*), 708 F.2d 1571, 1575-1576 (11th Cir. 1983).

characterized *Jones* as recognizing a "limited and narrow exception" to the general rule that "obtains when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." 680 F.2d at 1027. It is this language upon which petitioner relies in urging that the attorney-client privilege applies here. Yet in *Pavlick* the Fifth Circuit did not explicitly disavow the repeated statements in *Jones* that application of the privilege depended on the fact that confidential communications would be disclosed. In light of this Court's intervening decision in *Fisher*, it would be reasonable to expect at least some discussion of that issue if the court intended wholly to divorce the attorney-client privilege from its traditional purpose of protecting confidential communications. And in fact the separate opinions in *Pavlick* indicate that this was not the court's intent.[9]

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[9] Judges Rubin, Clark and Randall concurred only in the result. 680 F.2d at 1029. They observed, inter alia, (i) that attorney Pavlick had failed to present evidence that any communications between him and the third-party client concerning payment of the fee for the three indicted clients were for the purpose of obtaining legal advice for the third party, and (ii) that "the attorney-client privilege shields only those communications made for the purpose of securing such advice" (*ibid.*; see also *id.* at 1030 & n.2). Similarly, Judge Garwood stressed in his concurring opinion that "there is no showing that requiring Pavlick to answer the question posed will disclose any communication between Pavlick and [the third-party client] for the purpose of obtaining legal advice from Pavlick" (680 F.2d at 1031). In his dissent, Judge Politz, joined by Judges Tate and Williams, explicitly reiterated the language in *Jones* itself that the identity of the client should be protected " 'when so much of the substance of the communications is already in the government's possession that additional dis-

Moreover, the court in *Pavlick* also distinguished *Jones* and held the privilege inapplicable because it did not present the "peculiar facts" in *Jones*—including what the court viewed as the fishing expedition nature of the inquiry in *Jones* that involved the clients of "a generous portion of the criminal law bar of the lower Rio Grande Valley area" (680 F.2d at 1027). Similarly here, there can be no suggestion that the grand jury was engaged in a fishing expedition, since the specific check in question had been traced directly to petitioner's firm by other means. Against this background, the dictum in *Pavlick* upon which petitioner relies—in an opinion that actually *rejects* the claim of privilege—does not present a conflict with the Sixth Circuit's decision in this case, which likewise rejects the assertion of the attorney-client privilege.

c. Finally, petitioner erroneously asserts (Pet. 7) that the decision below conflicts with the Eleventh Circuit's decision on application for a stay in *In re Grand Jury Proceedings* (*Twist*), 689 F.2d 1351 (11th Cir. 1982). The Eleventh Circuit in *Twist*, like the Fifth Circuit in *Pavlick* and the court below, actually *rejected* the claim of privilege (689 F.2d at 1352-1353). Moreover, *Twist* cited *Jones* for the proposition that "[t]he attorney-client privilege is limited to confidential communications between the lawyer and the client made for the purpose of securing legal advice" (*id.* at 1352). Although the court in *Twist* also cited *Jones* for the proposition

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closures would yield substantially probative links in an existing chain of inculpatory events or transactions' " (*id.* at 1033, quoting 517 F.2d at 674). Thus, seven of the twelve judges participating in the decision in *Pavlick* explicitly discussed the matter of confidential communications.

that there is an exception to the general rule that the client's identity is not privileged where disclosure "would supply the last link in an existing chain of incriminating evidence likely to lead to the client's indictment" (*id.* at 1352-1353), in light of the other passages in the court's opinion, this language cannot be read as a holding that the potential for disclosure of confidential communications was not relevant.[10] That the Eleventh Circuit did not intend such a holding in *Twist* is made even clearer by its subsequent decision in *In re Slaughter*, 694 F.2d 1258 (1982). There the court (citing *Pavlick* and *Baird*) stated that fee information is privileged from disclosure only "where more than simple fee information will necessarily come to light by compliance with the order, thereby uncovering privileged information," and held that the case before it did not fall within that exception because "[n]o confidences will be disclosed by compliance with the order to give attorney's fee information." 694 F.2d at 1260.

d. Thus, contrary to petitioner's contention, there is no conflict among the circuits on the question whether the attorney-client privilege protects the identity of the client even where confidential communications would not be disclosed. The Seventh and Ninth Circuits have explicitly rejected such a rule, the Eleventh Circuit never adopted one, and although the dictum in *Pavlick* is ambiguous, it does not repudiate the language in *Jones* that appears to require a nexus to confidential communications. In any

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[10] The Eleventh Circuit in *Twist* also stated that it approved the reasoning of the Fifth Circuit in *Pavlick*, but that statement was made only in connection with the court's discussion of the distinct issue of the "crime or fraud" exception to the attorney-client privilege. 689 F.2d at 1352.

event, as the Seventh Circuit recently concluded after its thorough review of the cases, although there is language in some opinions referring to whether disclosure of a client's identity or fees would incriminate the client, "in most of the cases [in our view, all of the cases], the courts were prepared to *apply* the privilege only where the disclosure of the client's identity or fees would in fact have revealed the substance of what were indubitably confidential communications." *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 492-493 (emphasis added). See generally *id.* at 492-495. For this reason, whatever the precise reasoning or language employed, there is no indication of any conflict in the circuits with respect to the *result* that the courts of appeals have reached in these cases. Review by this Court therefore is unwarranted, especially now that the recent decisions of the Seventh and Ninth Circuits have brought some clarity to the area.

What is more, even if the Court were otherwise disposed to grant review in a case to decide whether the attorney-client privilege might in some circumstances permit a lawyer to refrain from disclosing the identity of a client or information pertaining to the payment of fees, this case would be a most unlikely candidate for recognition of such an extension of the privilege. To permit a lawyer to suppress the identity of the person who paid for services by means of a check drawn on stolen funds, even though disclosure would not threaten the sanctity of the attorney-client relationship with that person on other matters, would convert the attorney-client privilege from a protection against government intrusion or oppression into an instrument to avoid the consequences that ordinarily would befall a person who

passed a check drawn on stolen funds. Even the Fifth Circuit, on whose cases petitioner principally relies in asserting that there is a circuit conflict requiring resolution by this Court, has recognized that "[i]f a legitimate legal relationship is an evidentiary lead to subsequent, unrelated criminal activity, no substantial interest of society is served by protecting the name of the client and fee arrangement involved in the legitimate activity." *In re Grand Jury Proceedings* (*Fine*), 641 F.2d 199, 204 n.5 (1981). Moreover, a claim of privilege has been rejected in other cases in which payment of attorney's fees was linked to the proceeds of the crime itself or was direct evidence of the amount of income the client received in connection with an illegal enterprise. See, *e.g.*, *Genson* v. *United States*, 534 F.2d 719, 727-729 (7th Cir. 1976); *United States* v. *Jeffers*, 532 F.2d 1101, 1114-1115 (7th Cir. 1976), vacated in part on other grounds, 432 U.S. 137 (1977). There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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